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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RICHARD X. KNIPE, GLENN A. VALENTINE
and BERNARD C. FORD,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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SEPTEMBER, 1994

76 pp

QUESTIONS PRESENTED

1. Do United States district courts lack subject matter jurisdiction of otherwise valid Federal Tort Claims Act actions based on Federal Aviation Administration officials' negligent application of the constitutional principles, statutes, rules and policies by which they must conduct themselves, because the Federal Aviation Act of 1958 provides that National Transportation Safety Board (NTSB) orders — those that result from administrative review of FAA license suspension and revocation orders — shall be subject to review by the courts of appeals of the United States?

2. Is such subject matter jurisdiction lacking even where the actions complained of involved no FAA order?

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SEPTEMBER, 1994

Petitioners Richard X. Knipe, Glenn A. Valentine and Bernard C. Ford respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit filed December 3, 1993.

OPINIONS BELOW

That judgment, a-1 (appendix), upheld dismissal by the United States District Court, Northern District of New York, and incorporates by reference the district court's transcribed opinion, a-4; formal order of dismissal at a-18 and a-19.

JURISDICTION

The complaint initiated a Federal Tort Claims Act action against the United States. Jurisdiction of the United States District Court, Northern District of New York was pursuant to 28 U.S.C. §§ 1346(b).

Dismissed for lack of subject matter jurisdiction, an appeal was taken to the Second Circuit, jurisdiction pursuant to 28

U.S.C. § 1291. It affirmed dismissal by judgment entered December 3, 1993; order denying rehearing entered April 11, 1994.

Jurisdiction of the Supreme Court to review that judgment is invoked pursuant to 28 U.S.C. § 1254(1). An order extending time to file this petition to September 8, 1994, is dated June 27, 1994.

STATUTES INVOLVED

Statutes relevant to the issues are: 28 U.S.C. §§ 1346(b) and 1402(b).

Federal Aviation Act of 1958, as amended ("FA Act"), 49 U.S.C. app. §§ 1429(a), 1486, 1487 and 1506.

STATEMENT OF THE CASE

Knipe — The complaint, which contains numerous counts, basically consists of three separate actions that for the most part arose out of the same circumstances. Richard X. Knipe, starting in 1972 with a small twin-engine Piper, by 1988 built Mall Airways Inc. into a small regional carrier

with eight commuter aircraft. With Albany, New York, as its hub, and serving several upstate cities, Mall operated between Montreal and Toronto, Newark and LaGuardia airports. Knipe was majority owner and president, Valentine Director of Operations, Ford, a line captain with some administrative responsibilities.

For six years Mall, with FAA approval, had trained its 23 pilots in certain emergency evacuation procedures by viewing a videotape, such as, discharging a fire extinguisher, pulling out emergency evacuation windows. A new FAA inspector at the Albany Flight Standards District Office (FSDO), one Rene Koch, took exception to videotape training and agitated against it. Although he had no assigned responsibility for Mall Airways, he pursuaded its principal operating inspector (POI), who did, to take him along to perform a base inspection (usually a routine visit) in late October

1988. It lasted several days.

This involved primarily checking records for flight-crew qualifications. (Maintenance is handled by a principle maintenance inspector (PMI).) At the end of the inspection, contrary to the FA Act, § 605(b), 49 U.S.C. § 1425(b), which mandates that inspectors advise and cooperate in the maintenance and inspection of air carriers, the inspectors refused to tell management what, if anything, they had found that might be considered in violation of the Federal Aviation Regulations (FARs), 14 C.F.R. pts 1-199, so they could correct it, if a legitimate complaint.

Two weeks later, early November, a special inspection team showed up. It consisted of a half-dozen or so inspectors collected from around FAA's Eastern Region. Koch had been appointed team leader. That was in violation of strict agency policy that team leaders *not* come from the local

FSDO since a major purpose of a special inspection is to find out if local inspectors are doing their job: if something's wrong, they should have spotted it. And, with a local in charge, personalities might well contaminate objectivity. Hard words had been exchanged with Koch over his complaints about the videotape training, a method used for six years with FAA approval, and for which he had no official responsibility.

On the afternoon of the second day, Koch left for an hour or two. (His office 200 ft. across a parking lot at Albany County Airport.) He returned with a letter that told the company it had to show that its 23 pilots were properly trained in emergency procedures and, if it could not do so, emergency action to shut it down was threatened. Koch knew how the training went since he had attended the annual videotape session earlier that year.

Knipe saw the handwriting on the wall, especially since Koch's boss, who could have blunted the matter, was out with a heart attack. So the next day Knipe shut down the airline and brought all pilots and aircraft back to Albany where, in an hour or two, they were given the training — extinguisher/emergency window — Koch insisted had to be hands-on.

This, however, did not satisfy Eastern Region headquarters officials. Even though Mall had just complied with the only claimed discrepancy of which they had been advised, those officials immediately threatened Mall Airways with an emergency revocation of its operating certificate unless it agreed to a consent order that would allow the FAA to continue its "special inspection" and the airline stay down until it was completed. This was akin to having one's head in the guillotine and being handed a pen, told to "Sign here, or

we'll pull the lever." and being kept strapped to the device after signing!

The claim that a situation existed that would justify emergency revocation of Mall's certificate violated the FAA rule that such power not be used except for an immediate threat to the public.[1] There of course was none: the only matter complained of, whether justified or not, had been rectified. No maintenance charges ever resulted from the special inspection that kept Mall Airways shutdown *for over two months*. That destroyed Mall, as it would have American Airlines; 106 employees lost their jobs; it killed a pending sale of the company for $3.5 million dollars. The evidence will further show this destruction

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[1] This "rule" is contained only in FAA's enforcement manual (text in footnote 10), not in the Code of Federal Regulations where it should. *Contrast* 14 C.F.R. § 408.25 (1952). This was a formal Civil Aeronautics Administration rule using virtually identical language. Why no rule today?

was deliberate. That it was a setup is obvious from the inspectors' refusal after the base inspection to tell Mall management what they thought was wrong (so they couldn't correct it and deprive FAA officials of the excuse to pull a special inspection), then, let it fester for two weeks, a problem such a threat to air safety the company had to be shut down. This was confirmed when Koch's term as team leader lasted just two days till right after he had served on Mall Airways the "smoking gun" letter about the 23 pilots.

Mr. Knipe's portion of the complaint alleged other counts, but the foregoing are central and suffice to underscore that through FAA officials' negligence and wrongful acts laws and agency rules were violated. *Nothing* concerning Mall or Knipe involved issuance of any FAA certificate order issued pursuant to FA Act, § 609, 49 U.S.C app. § 1429(a), an order that could

have first been taken to the National Transportation Safety Board (NTSB) for hearing and review, then review, if adverse, sought in a circuit court. In short, there was no way Knipe could challenge the unlawful actions taken against his company, no remedy, then or later, except in district court.

Valentine — The consent order required Mall Airways to fire Glenn Valentine as Director of Operations, and Bernard Ford from his management position, before it would be allowed to start up operations. FAA officials had no authority to require this. As a result, even though Valentine and Ford could have stayed on as line pilots, the company fired them altogether. Additionally, Knipe, Valentine and Ford, were blacklisted by FAA officials from holding any air-carrier position for which they were qualified.

In January 1990, FAA regional counsel,

pursuant to § 609, issued an order revoking Valentine's Air Transport Pilot certificate (ATP). As provided by that section, since no emergency was declared, its effectivness was stayed. The order (used as the complaint by the NTSB) asserted he had "caused fraudulent entries to be made in several pilot training records," and as a pilot "had flown four flights" when he had not met emergency recurrent training requirements."

This latter, of course, went back to Koch's complaint about the videotape.[2] To charge Valentine with a safety violation was wrongful because officials well knew the training he'd had was approved by the FAA. The records charge had no basis — the

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[2] The irony of this affair, indeed, tradegy, is that all that had to be done to change the method of training was to hand-carry across the parking lot to Mall Airways a letter from the FSDO withdrawing the videotape exemption and, say, give them 30 days to get all pilots trained hands-on.

details are not worth pursuing here — suffice it say the NTSB administrative law judge (ALJ) rejected all charges. But critical to the complaint and the subject matter jurisdiction issue is the fact that Valentine was charged with violating a non-existent rule. FAR Part 135, 14 C.F.R. pt 135 (scheduled air-taxis), under which his duties were defined. As desireable as such a rule would seem, Part 135 contains none about fraudulent recordkeeping. Thus he was charged with violating a non-existent rule. (At least four other FAR parts do contain such rules, but they are self-limited to that particular Part. FAA officials know about Part 135; why they do nothing about it is unknown.)

A related count in the complaint is that it was wrongful to use revocation of Valentine's ATP as a penalty when the offense charged had no relationship to any pilot privilege he had the right to

exercise with that license. It related solely to his position as director of operations.

Relevant to the second question posed to the Court is the fact that none of the above charges challenges FAA authority to issue the certificate order.

The salient charge in the complaint concerning use of a certificate action under § 609 is that such a suspension or revocation, when used strictly for a safety violation, is a penalty created by the executive branch and therefore unconstitutional.[3] The matter may be explained thus: No statute so much as hints at using suspension or revocation as a penalty for safety violations. The government's claim, however, is that § 609's

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[3] *See United States v. Eaton*, 144 U.S. 677 (1892), *United States v. Grimaud*, 220 U.S. 506 (1910), and 5 U.S.C. § 558(b) ("A sanction may not be imposed . . .except . . . as authorized by law.").

language authorizes the Administrator to suspend or revoke anytime he deems it to be in the interest of the public and air safety.[4] Since 609 fails to so much as hint at a connection between violations and license suspension or revocation, the logic is that the executive branch extended this claimed authority to say: "Obviously, it's in the interest of the public and air safety to suspend or revoke a pilot's license as a penalty for the violation of a safety rule." Which means the executive branch created it. *In other words, the complaint does not challenge the* government's *own claim of authority, but charges that even assuming it is valid it leads to an*

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[4] *See Wilson v. Civil Aeronautics Board*, 244 F.2d 773, *cert. denied*, 355 U.S. 870 (1957), the touchstone case for this line of reasoning. (Several cases follow *Wilson* but citing them adds nothing to the jurisdiction issue.)

unconstitutional act.[5]

Ford — Taking flights while lacking proper emergency training was a charge also brought against Bernard Ford and used to justify a 120-day suspension of his ATP. As are all the rest, it is a count in the complaint, in addition to the firing and blacklisting. The NTSB ALJ dismissed his case because it was instituted long after the Board's stale complaint rule of six months had expired. *See* 49 C.F.R. § 821.33. As with Valentine, the salient charge in regard to the certificate action was that the suspension was a penalty created by the executive branch.

It of course is fundamental here that:

> The issue is not whether a plaintiff will ultimately prevail but *whether the claimant is entitled to offer evidence to support the claims*. Indeed it may

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[5] All this is explained in counsel's law review article: *see Smith*, FAA Punitive Certificate Sanctions: The Emperor Wears No Clothes; Or, How Do You Punish a Propeller?, 14 *Transp. L.J.* 59 (1985).

> appear on the face of the pleadings that a recovery is very remote and unlikely *but that is not the test*. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, *the allegations of the complaint should be construed favorably to the pleader*.

Scheuer v. Rhodes, 416 U.S. 232, 236-37 (1974).

REASONS FOR GRANTING THE WRIT

I. EXCEPTIONAL IMPORTANCE

A. Conflict between circuits

The district court dismissed plaintiffs' case on grounds that it lacked subject matter jurisdiction because FA Act, § 1006, 49 U.S.C. App. § 1486,

> "provides that any order, affirmative or negative, issued by the NTSB or Secretary of Transportation shall be subject to review by the Courts of Appeals of the United States or the United States Court of Appeals for the District of Columbia.
>
> Defendants contend that because the FAA vests appeals of administrative decisions of the FAA and the NTSB in the Courts of Appeals, this Court lacks jurisdiction over plaintiffs' claims.

Dist. Ct. Transcript at 4, a-7.[6] The Second Circuit affirmed: "The district court lacked subject matter jurisdiction substantially for the reasons stated in Chief Judge McAvoy's decision . . ." 2nd Cir. Jdgm. at 2, a-2.

This decision directly conflicts with the United States Court of Appeals for the District of Columbia Circuit. As noted in the statement of the case, *supra*, the complaint plainly charges that FAA officials negligently violated the Constitution, agency statutes, rules[7] and policies. The

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[6] The district court also dismissed on grounds of res judicata and that the acts complained of were within the FTCA's discretionary clause. These were superfluous, since by its own holding it had no jurisdiction to consider them; in any event, they are without merit. This is examined, *infra*.

[7] Since none are to be found in the Code of Federal Regulations, they are "rules" (not *regulations*) only within the definition of the Administrative Procedure Act (APA): "'[R]ule means the whole or

D.C. Circuit has held in a well-reasoned opinion — an FAA case, appropriately enough — that negligent application of agency rules not only presents a valid FTCA cause of action, but that § 1006 does not preclude district court subject matter jurisdiction. *See Beins v. United States*, 695 F.2d 591 (D.C. Cir. 1982). We treat *Beins* in greater detail, *infra*.

B. One million airmen at risk

The FAA's records center in Oklahoma City advises that just over one million licensed pilots and mechanics are active in aviation. Also, thousands of employees for small air-taxis and carriers like Mall are vulnerable. The government's position is

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part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . .'" 5 U.S.C. § 551(4). The irony of this is that the FAA is shielded from scrutiny by the very fact it has no published enforcement regulations regarding punitive certificate actions.

that no matter how unlawful the acts of FAA officials, if they couch them in terms of an enforcement order, none of these citizens is entitled to recover damages no matter how valid any lawsuit under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680.

This means the only way a pilot can vindicate himself is to go to trial at the NTSB, 49 U.S.C. App. § 1429(a), appeal any adverse decision to the full Board, *id.*, and, unless it reverses, petition a court of appeals to review that. *Id.* and 49 U.S.C. § 1486. Even if successful, obviously, that would not bring damages.

Several questions highlight the problems here: Suppose after years of proceedings (three to four is normal) a court of appeals agrees that FAA license penalties were created by the executive branch, are therefore unconstitutional, and agency officials were negligent in using them? How

would the airman be compensated? Since there was no trial for damages, would he not have to start all over in District Court? Does this not then establish a doctrine that in order to collect damages he must go through one system of justice in order to utilize another? (Meanwhile, the statute of limitations has run.)

We estimate that *at least* four out of five airmen (the FAA does not publish enforcement statistics), because of cost, time and trouble, usually the private pilot who does not depend on his license to make a living, simply take the penalty and never go to an NTSB hearing; or, if losing at the hearing, decline to appeal to the full Board, which requires appeal briefs and, if you don't already have one, a lawyer (it is usually two and one-half years from date of infraction to a full Board decision); and, if losing there, decline to go to a court of appeals.

At the start, some may deal for and obtain a reduced suspension, so go no further. Otherwise, especially the professional who faces one, two or three months out of work, the airman is often looking at several thousand dollars in legal fees to defend what is usually no more than an ordinary traffic ticket and, most often, due to an inadvertant act. Suppose after serving, say, a 60-day suspension, the citizen airman finds out the penalty was unlawful, perhaps because an appeals court finally made such a ruling. Does the fact that he chose not to fight the case estop him from bringing either a *Bivens*[8] or FTCA action?

II. DISTRICT COURT HAS JURISDICTION

A. FA Act resolves issue[9]

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[8] *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

[9] Any discussion of this issue should be conducted in light of this Court's admonition to the federal

Congress, in the Judicial Code, has mandated jurisdiction over FTCA actions to United States District Courts. 28 U.S.C. § 1346(b). The government's position then, logically, is that Congress, when it enacted FA Act, § 1006, 49 U.S.C. app. § 1486, intended that if FAA officials couched their actions in a formal punitive suspension or revocation order issued pursuant to § 609, 49 U.S.C. app. § 1429(a), even though that order had no legal basis, the citizen-airman would be denied the right to pursue an otherwise legitimate FTCA action

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courts contained in *McCarthy v. Madigan*, 503 U.S. ___, 117 L.Ed.2d 291 (1992): "Notwithstanding these substantial institutional interests, federal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them. [Citing case.] 'We have no more right to decline the exercise of jurisdiction which is given, that to usurp that which is not given.' [Citing case.]" *Id.* at 300.

in district court. And, the only way he could vindicate the wrongfulness of the action would be if he chose to pursue a lengthy administrative process, followed by review in a court of appeals.

Remarkably, the issue here was resolved by Congress itself in the Federal Aviation Act of 1958:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

49 U.S.C. app. § 1506; Pub.L. 85-726, Title XI, § 1106, Aug. 23, 1958, 72 Stat. 798. Jurisdictional conflicts do sometimes exist, however, between courts and administrative bodies whereby the controversy should remain in the latter. This Court has laid down guidelines helpful in determining the matter. In *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), it discussed the doctrine of primary jurisdiction. That doctrine "'is concerned

with promoting the proper relationships between the courts and administrative agencies charged with particular regulatory duties.' *United States v. Western Pacific R. Co.*, 352 U.S. 59, 63 (1956)." *Id.* at 303. It was important to the Court that "In this case . . . we are not faced with an irreconcilable conflict between the statutory scheme and the persistence of common-law remedies." *Id.* at 290.

The Court was referring to a situation where "The conflict between the court's common-law authority and the agency's rate-making power was direct and unambiguous. . . ." *Id.* "Under the circumstances, the common-law action and the statute are not 'absolutely inconsistent' and may coexist, as contemplated by § 1106." *Id.* at 300. Pointing to another criteria, the Court noted that "the judgment of a technically expert body is not likely to be helpful in the application of these standards to the

facts of this case."*Id.* at 305. *Accord Mark Aero, Inc. v. Trans World Airlines*, 411 F.Supp. 610 (D.C.W.D.Mo. 1976).

Unless the United States can demonstrate that the FAA has authority to create its own penalties and violate its own statutes and rules, there is no "irreconcilable conflict between the statutory scheme and the persistence of common-law remedies." Nor "will the judgment of a technically expert body" be helpful.

Deciding whether the Federal Tort Claims Act has been violated certainly does not require the resolution of issues that "have been placed within the special competence of an administrative body." *United States v. Western Pacific Railroad Company, supra*, 352 U.S. at 63-64.

Legislative history — The legislative history of the Federal Aviation Act of 1958 confirms Congress' hands-off attitude towards legal remedies:

> **Effect of reenactment of provisions of present law.**--The committee of conference wishes to make it clear that . . . the Congress does not intend that the reenactment of portions of the Civil Aeronautics Act of 1938 shall constitute legislative adoption of administrative interpretations and practices or of judicial decisions under that act. It is important that there be no doubt on this point . . .
>
> [T]he reenactment of provisions now in effect is to be regarded as a completely neutral factor in any questions arising hereafter as to the interpretation of the present law or of this new legislation.

Federal Aviation Act of 1958, Pub.L. No. 85-726, 72 Stat. 732, U.S. Code Cong. & Admin. News 3771-72 (emphasis added).

Any claim that FA Act § 1006 provides the exclusive legal path by which an airman may challenge the imposition of a license suspension or revocation, a penalty created by the executive branch, is without merit.

The Second Question posed — It is critical to state once more that no such order was issued in regard to Mr. Knipe or Mall Airways. Consequently, in any event, subject matter jurisdiction could not be

the basis of dismissal as to those counts in the complaint.

B. Case law

The seeming conflict between § 1006 and FTCA subject matter jurisdiction has been resolved with great clarity by the District of Columbia Circuit. In *Beins v. United States, supra*, that Court discussed the question at some length:

> The government presses its objection on appeal that the district court lacked subject matter jurisdiction because the courts of appeals have exclusive jurisdiction under the Federal Aviation Act to review orders of the FAA. *See* 49 U.S.C. § 1486(a). . . .
>
> We reject the government contention that there is no subject matter jurisdiction under the FTCA in this case. On its face the FTCA provides a remedy for negligent acts of government employees; none of the several explicit exceptions in the FTCA exempts negligent acts solely *because the legal validity of the employee's actions is appealable on other grounds to other administrative bodies or eventually to the courts through the Administrative Procedure Act (APA)*. *See* 28 U.S.C. §§ 1346(b), 2680. Nor does this case fall under a judicially established exemption . . .
>
> Moreover, it is obvious that *an appeal under the APA will not provide any remedy in damages*, while the prime purpose of the FTCA is to compensate vic-

tims of negligent government conduct. . . .

> In this case we cannot find an express requirement in either statute or case law that the appellant had to appeal the FAA's denial of medical certification to the NTSB before he could initiate his FTCA action, nor any reason why we should now imply one. We acknowledge that a claim that the certification process was performed negligently might conceivably involve issues similar to those necessary to decide whether the certificate should have been denied. . . . *[A] successful administrative appeal could not, however, provide the damages remedy appellant seeks here.* . . .

695 F.2d at 597-99 (emphasis added). *See also Duncan v. United States*, 355 F.Supp. 1167 (D.D.C. 1973). Duncan was an airline pilot denied a medical certificate on grounds he did not meet required standards. He was awarded FTCA damages. "Plaintiff here did not controvert the power of the F.A.A. Administrator to make rules concerning the certification of airline pilots; rather he alleges negligence in the application of the established standards of certification." *Id.* at 1169.

Mr. Knipe does not challenge the FAA's

authority to have issued an emergency order revoking Mall Airways' operating certificate, but has asserted that agency officials were negligent in that they violated "established standards" for when such draconian power is to be used.[10]

Duncan was extensively reviewed and approved by the D.C. Circuit in *Beins v. United States, supra*, 695 F.2d at 601-03. Because of factual differences, Beins was not successful in his challenge, but the D.C. Circuit's support for the principles

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[10] As noted, those standards were once contained in the Code of Federal Regulations. The policy reads:

> a) Emergency suspension or revocation of a certificate should be used only as an emergency safety measure and, thus, to provide immediate protection to the public. Generally the longer the interval between the date of the incident and date of the action, the more difficult it will be for the FAA to claim that an emergency exists. Therefore, emergency actions should be taken as soon as possible after the date of the incident.
> (b) An emergency suspension or revocation should never be used for punitive reasons. When receiving a recommendation for emergency action, counsel should ensure that there is sufficient evidence of an emergency . . .

Compliance and Enforcement Program, FAA Order 2150.3, ¶ 1202.g.(1)(a) & (b) (1980, Reprint 1983).

set forth in *Duncan* was solid. *See also Harr v. United States*, 705 F.2d 500, 504 (1983) ("We believe the government's argument misses the point that the FAA can be liable for negligent actions of its medical certification staff, and that Harr indeed alleged such negligence.").

Paralleling the rationale of *Beins*, this Court in *McCarthy v. Madigan, supra*, a *Bivens* civil rights action, laid down the same basic principle: If the forum in which the government argues that your case properly belongs can provide *no money damages*, much less a trial in which one could establish same, the district court has subject matter jurisdiction.

In regard to this conflict between circuits. this statute should be noted:

> Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred."

28 U.S.C. § 1402. Obviously, the airman who is the subject of an illegal FAA enforcement order and lives in Washington, D.C., or who can pin the negligent or wrongful action on an official in Washington Headquarters, is in a far luckier position than one who does not. Clearly, this is not just, and the conflict should be resolved.

III. DISTRICT COURT OPINION

A. Res judicata

Introduction — Conspicuous by its absence from the trial court's opinion is any discussion of the individual counts in the complaint. Each charge is carefully separated from any other and can stand alone. The opinion deals in sweeping generalities and reflects a serious misapprehension of what the case is about. It further overlooks the critical aspect of the case, mentioned above, that the majority of charges have nothing to do with challenging FAA authority to issue

punitive suspension and revocation orders.

An example is the district court's reliance on *Green v. Brantley*, 981 F.2d 514, 517 (11th Cir). A *Bivens* case, factually, it has no relevance to the instant action. Green was complaining because he enjoyed a Designated Pilot Examiner certificate issued by the FAA pursuant to 49 U.S.C. app. § 1355(a). This allowed him to increase his flight instructor income by charging students for the required flight test after which, if they passed, he could issue them a license on behalf of the FAA. Section 1355(a) provides that the Administrator "may rescind any delegation by him pursuant to this subsection at any time and for any reason which he deems appropriate." No charge in the instant case is remotely related.

But this illustrates why the district court's failure to discuss the complaint

count by count undercuts any validity of the reasons given for dismissal.

Pointing out that

> many of the allegations made in the present complaint really are the same charges that you put forth in the case before me last time . . . So inasmuch as the complaint does restate those claims, it's going to be dismissed and is hereby dismissed based upon the doctrine of res judicata.

Dist. Ct. Transcript at 3, a-5. There are two problems with this: (1) Res judicata has no application; (2) If a statute mandates that subject matter jurisdiction lies in another forum, then the district court had no authority to address the issue because it was tantamount to assessing the merits of the case.

Res judicata — Plaintiffs instituted a *Bivens* action several months prior to the FTCA action. Timing was due to being up against a statute of limitations in the former, and the need to wait six months

after filing a claim in the latter. [11] The

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[11] The same district judge dismissed that case for failure to state a claim. Regrettably, on appeal, the case was terminated for reasons unrelated to the merits. *See Knipe v. Skinner*, 999 F.2d 708 (2nd Cir. 1993). This occurred because the district court failed to deliver a copy of the judge's dictated transcript (not supplied routinely to litigants), after weeks of waiting, and Second Circuit staff counsel refused to extend time for the opening brief, counsel, *inter alia*, appealed that failure as a violation of due process. In the meantime, the transcript arrived. It did deal with individual counts, so it was dealt with in appellants' reply brief. The Second Circuit deemed that approach frivolous. It may have been less than cerebral, but counsel strongly disagrees that there was anything frivolous about it. The situation was induced by Second Circuit staff.

The district judge felt so strongly that it was frivolous to complain about the FAA actions in regard to Mall Airways and the plaintiffs, that he assessed combined sanctions in excess of $15,000 against counsel for simply filing complaints. *See Knipe v. Skinner*, 19 F.3d 72 (2nd Cir. 1994). Consolidated for appeal, these will be brought

doctine was misapplied. "[T]o be applicable, [it] requires identity in thing sued for as well as identity of cause of action, of persons and parties to [the] action, and of quality in persons for or against whom claim is made." Black's Law Dictionary 1174 (5th ed. 1979).

Except for plaintiffs, none of this obtains: the doctrine does not apply. Res judicata is another way of invoking *stare decisis*. That doctrine "only arises in respect of decisions directly upon the points in issue." *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429, 574 (1895). To be binding as precedent, there must have been an application of the judicial mind to the precise question necessary to be determined in order to fix the rights of the parties. *Wells v. Kansas City Life Ins.*

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before this Court no later than October 16, 1994 (Order extending time, No. A-68). Counsel would hope they and this case can be heard in tandem.

Co., 46 F.Supp. 754, 758 (D.C.N.D. 1942).

No authority to decide issue — Since the district court held that FA Act, § 1006, 49 U.S.C. app. § 1486, precluded its jurisdiction, it follows logically that it had no authority to consider res judicata, or even the discretionary clause exception discussed below. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). ("A court lacks discretion to consider the merits of a case over which it is without jurisdiction . . ."). Logically, res judicata is a form of looking at the merits.

B. FTCA discretionary exception

The same is true of the district court's contention that the acts complained of came within the discretionary function exception of the FTCA, 28 U.S.C. § 2680(a), which would support a lack of subject matter jurisdiction. Dist. Ct. Transcript at 6, a-10. Moreover the plaintiffs would have at

least one chance to amend their complaint were such a ruling made. It is impossible, however, to deal with this since no effort was made to address individual counts. Petitioners cannot tell just what charge the trial court is talking about. Moreover, would that court seriously urge that FAA officials had discretion to violate mandates of the FA Act, agency "rules" and policies?

Cited by the trial court, this case exemplifies its misapprehension of the issues and why a count by count analysis is so necessary: *Sky Advertising v. McClure*, 951 F.2d 1146 (9th Cir. 1991). It has no relevancy whatsoever. A combined FTCA and *Bivens* action, it asserted that FAA had unlawfully promulgated a regulation concerning aircraft banner towers. Nothing here involves a claim that any rule was improperly promulgated. *The problem with FAA punitive certificate sanction policy is*

that no APA promulated rules exist!

SUMMARY DISPOSITION

We urge the Court to make a summary disposition on the merits, reverse the dismissal, and order the court of appeals to remand this case to the district court with instructions to proceed accordingly.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

Lawrence B. Smith
Attorney for Petitioner

September 1994

APPENDIX

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NDNY
92-cv-1389
McAvoy, Ch. J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of December on thousand nine hundred and ninety-three.

Present: Honorable Amalya L. Kearse
Honorable Dennis G. Jacobs
Circuit Judges
Honorable Robert L. Carter*
District Judge.

Richard X. Knipe, Glenn A. Valentine and Bernard C. Ford,

Plaintiffs-Appellants

No. 93-6161

---

* Honorable Robert L. Carter, of the United States District Court for the Southern District of New York, sitting by designation.

v.

United States of America,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed. [p. 2] The district court lacked subject matter jurisdiction substantially for the reasons stated in Chief Judge McAvoy's decision on the record of April 12, 1993.

s/Amalya L. Kearse, U.S.C.J.

s/Dennis G. Jacobs, U.S.C.J.

s/Robert L. Carter, U.S.D.J.

[p.1] UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed APR 11, 1994

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of April, one thousand nine hundred and ninety-four.

Richard X. Knipe, Glenn A. Valentine and Bernard C. Ford,

Plaintiffs-Appellants,

vs. DOCKET No. 93-6161

UNITED STATES OF AMERICA,

Defendant-Appellee.

A petition for rehearing having been filed herein by Plaintiff-Appellants Richard X. Knipe, Glenn A. Valentine and Bernard C. Ford in the above entitled matters,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

FOR THE COURT,

GEORGE LANGE III, Clerk

By: s/Carolyn Clark Campbell
Chief Deputy Clerk

[p.1]
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICHARD X. KNIPE, et al.,

Plaintiffs,

v. 92-CV-1389
(MOTION DECISION)

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, New York 12207, on Monday, April 12, 1993, before the HON. THOMAS J. McAVOY, United States District Judge.

[p.2] APPEARANCES:

FOR THE PLAINTIFFS:

Lawrence B. Smith, Esq.

FOR THE DEFENDANT:

U.S. DEPARTMENT OF JUSTICE

BY: ROBERT A.K. DOEHL, ESQ.

-and-

FEDERAL AVIATION ADMINISTRATION

BY: JOHN C. KNUDSEN, ESQ.

THE COURT: As I indicated to you initially, many of the allegations made in the present complaint really are the same charges that you put forth in the case before me last time, which I will call Knipe I, 91-CV-1338. And that is, basically what's underlying all this is that the FAA doesn't have the authority to do what it has done and that the actions of the federal officials acting thereunder violated various rights, constitutional rights to which plaintiffs are entitled.

So, inasmuch as the complaint does restate those claims, it's going to be dismissed and is hereby dismissed based

upon the doctrine of res judicata. However, since plaintiff's counsel has framed the present complaint pursuant to the Federal Tort Claims Act, the Court will make its analysis based upon the plaintiffs' counsel's approach, and I recognize, as you've argued to me, that I must take everything that's stated in your complaint as factually correct.

Now, the Secretary of Transportation is charged with the responsibility for safety in air commerce. 49 US Code App. 1421(a). In exercising her [sic] powers and duties, the Secretary of Transportation is required to consider the regulation of air commerce to promote its safety and development, and the promotion, encouragement and development of civil aeronautics as in the public interest.

As the Secretary's designee, the Federal Aviation Administration's administrator is empowered to [p.4] establish

FARS concerning minimum safety standards and for the inspection and enforcement of such standards. § 609(a) of the Federal Aviation Act authorizes the Secretary of Transportation to issue orders suspending, revoking, modifying or amending any type of aviation certificates if it's determined that safety in air commerce or air transportation and the public interest requires.

§ 1486 provides that any order, affirmative or negative, issued by the NTSB or Secretary of Transportation shall be subject to review by the Courts of Appeals of the United States or the United States Court of Appeals for the District of Columbia.

Defendants contend that because the FAA vests appeals of administrative decisions of the FAA and the NTSB in the Courts of Appeals, this Court lacks jurisdiction over plaintiffs' claims. Recently, in the

case of Green v. Brantley, at 981 Fed 2d 514, the claims were in -- I am sorry, the Eleventh Circuit held that the merits of the plaintiffs Bivens' claim, a claim brought last time before this Court, were inescapably intertwined with a review of the procedures and merits surrounding the revocation of his designated pilot examiner certificate over which the Court of Appeals had exclusive jurisdiction.

Therefore, the Court held that because the Court of Appeals had exclusive jurisdiction over review of the [p.5] FAA orders pursuant to 49 USC App. 1486, the District Court was without subject matter jurisdiction to hear the plaintiffs Bivens' claim.

Certainly, the facts of this case, the instant plaintiffs' tort claim case, are inextricably intertwined with a review of the procedures and merits surrounding the actions taken by the FAA officials. Based

upon the holding in Green, this Court lacks subject matter jurisdiction to hear the instant challenge, notwithstanding the fact that this time, the plaintiff pled the case as a Federal Tort Claims Act action instead of Bivens' action. Nonetheless, defendants are protected by the discretionary function exception to the Federal Tort Claims Act.

The Act generally authorizes suits against the United States for damages for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting in the scope of his office or employment. Assuming that the complaint states such a claim, this waiver of sovereign immunity is not without its exceptions.

§ 2680 of Title 28 lists the categories of claims which Congress has chosen to exempt from this seemingly broad waiver of immunity. Defendants contend that the

exclusion applies and, therefore, the complaint should be dismissed pursuant to 12(b)(6). However, before proceeding to [p.6] an analysis of the discretionary function exception, the Court finds that inasmuch as plaintiffs are challenging the validity of the FAA regulations at issue through an action sounding in tort, the complaint is dismissed.

In Sky Advertising v. McClure, 951 Fed 2d 1146, the Ninth Circuit held that the plaintiff could not challenge the validity of FAA regulations through an action under the Federal Tort Claims Act because that's not what Congress intended in passing the Federal Tort Claims Act. Although Plaintiffs' counsel has argued in opposition papers that plaintiffs aren't challenging the validity of any FAA regulations, the complaint, the document itself certainly suggests to this Court that plaintiffs are mounting such a challenge. Therefore,

inasmuch as the complaint challenges the validity of any FAA regulations at issue, it's hereby dismissed. See also C.P. Chemical Company v. United States, at 810 Fed 2d 34.

Now, in relevant part, § 2680 provides that the waiver of sovereign immunity embodied in the Federal Tort Claims Act does not apply to any claim based upon an act or omission of an employee [p.7] of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

As the Supreme Court stated, the determination of whether the discretionary function exception bars a suit against the

Government is guided by several established principles. Berkovitz v. United States, 468 US 531.

First, considering the nature of the challenged conduct, the Court must decide whether the action taken is a matter of choice for the Government employee. Second, if the action is one that involves an element of judgment or choice, the Court must consider whether that judgment is the kind of judgment that the discretionary function was intended to shield from liability.

In enacting the discretionary function exception, Congress intended to prevent second guessing of legislative and administrative decisions grounded in social, economic and political policy through a medium of an action in tort. United States v. Varig Airlines, 467 US 797. Therefore, the exception protects only Govenmental actions and decisions based on consider-

ations of public policy. That's again the Berkovitz case, at 538.

Plaintiffs cannot credibly dispute that the actions challenged in the complaint are of a kind that involve an element of judgment or choice. The conduct challenged necessarily involves decisions by FAA officials as to how to [p. 8] proceed with inspections and as to what types of enforcement mechanisms are appropriate to ensure compliance with the appliable safety regulations. Nowhere in plaintiffs' opposition papers do they cite a regulation or statute which specifically proscribes a course of conduct which the FAA officials did not follow. See Berkovitz, at 536. Therefore, the Court finds that the first element involved is satisfied.

Next, the Court must consider whether the judgment exercised by the FAA officials at issue are the type that are based on considerations of public policy. In Varig,

the Supreme Court stated that when an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind. That's Varig, at page 819 and 820. In this vein, the Courts have held that decisions regarding the granting or denial of a medical certificate are inherently tied to the FAA public safety policies and, therefore, the type of decisions that Congress sought to protect from liability in tort. That's Foster v. United States, 923 Fed 2d 765. See also Heller v. United States, 803 Fed 2d 1558. Likewise, other Courts have held that the decision by FAA officials as to whether to establish a departure procedure for an airport is protected by the discretionary function exception. That's West v. Federal Aviation Administration, 830 Fed 2d 1044.

[p. 9] Now, here, the complaint alleges

that the officials named in the complaint negligently applied the statute and regulations governing the suspension of aviation certificates. The decision to suspend an aviation certificate is, without a doubt, a decision grounded in considerations of public policy. Indeed, the statutory authority for taking such action, 49 USC App. 1429(a) authorizes suspension of aviation certificate if it's determined that safety in air commerce or air transportation and the public interest require.

Congress has left to the FAA discretion the establishment and enforcement of safety standards. It would contradict Congressional intent to now find that in exercising that discretion, the FAA would be exposed to liability under the Federal Tort Claims Act. This case definitely falls within the discretionary function exception to the FTCA and is, therefore, dismissed.

Now, it's clear, as I mentioned before when I had a short dialogue with plaintiffs' counsel, that what you are doing is simply attempting another creative avenue to beat a dead horse. The root of this action, the previous one decided by this court, and countless other actions filed by Mr. Smith, in his own personal belief that the FAA lacks the authority to do what it did, to do what it did in this case. While these are probably certainly strongly held beliefs, the Courts of the nation have rejected this thesis time and time again. [p.10] Attempting to disguise the arguments as an action sounding in tort does not cloak them with validity.

In response to the instant motion for sanctions, Mr. Smith, you filed a motion to strike defendant's Rule 11 motion. In the alternative, you have asked for an extension of time in which to respond.

You've argued to me on papers that you

shouldn't have to respond to a motion for sanctions until the Court decides the motion to dismiss because that decision could well render the motion for sanctions moot. Well, that's not the case here. But, however, I am going to reserve decision on the sanction motions and I am going to direct you to respond to the merits of the motion for sanctions or advise me of your intention not to oppose the motion on or about April 23rd. You have to either respond on the merits to the motion that defense made to the sanctions or advise me you don't intend to oppose it by April 23rd. We don't need any hearing. Put your arguments on paper.

And if the Government would please submit an order with respect to the part of the motion that the Court has decided this morning.

Thank you, gentlemen.

MR. SMITH: Could I, your

Honor, ask the court reporter now to send me a quick bill, what this will cost, because it causes a lot of problems.

THE COURT: Sure you can.

MR. SMITH: I would like to have a copy.

[p.1] STUART E SCHIFFER
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U.S DISTRICCT COURT
N.D.N.Y.
FILED APR 23 1993

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

RICHARD X. KNIPE, GLENN A. VALENTINE and BERNARD C. FORD,

Plaintiffs,

v. Civil No.92-CV-1389 TJM

UNITED STATES OF AMERICA,

Defendant.

ORDER

It is hereby **ORDERED, DECREED** and **ADJUDGED**, that Defendant's Motion to Dismiss is granted and that Plaintiffs' Complaint is dismissed with prejudice with Plaintiffs to take nothing.

[p.2] Dated this 22nd day of April, 1993.

s/Judge Thomas J. McAvoy
U.S. District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICHARD X. KNIPE, GLENN A. VALENTINE and BERNARD C. FORD,

Plaintiffs,

v.

UNITED STATES OF AMERICA

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 1:92-CV-1389 (TJM-DNH)

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: that the above action is dismissed with prejudice as in accordance with Judge McAvoy's Order filed April 23, 1993 which granted the defendant's Motion to Dismiss.

Dated April 30, 1993.

s/George A. Ray,
Clerk

STATUTES

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1346

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District

Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1402(b)

Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

49 U.S.C. App. § 1429(a) (1982)

[Note: Breakdown into segments with numbers in brackets supplied for clarity.]

[1] The [Administrator] may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility or air agency, or may reexamine any civil airman.

[2] If, as a result of any such reinspection or reexamination,

[3] or if, as a result of any other investigation made by the [Administrator], he determines

[4] that safety in air commerce or air transportation and the public interest requires,

[5] the [Administrator] may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate,

air navigation facility certificate (including airport operating certificates), or air agency certificate.

[6] Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the [Administrator] shall advise the holder thereof as to any charges or other reasons relied upon by the [Administrator] for his proposed action and,

[7] except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificates should not be amended, modified, suspended, or revoked.

[8] Any person whose certificate is affected by such an order of the [Administrator] under this section may appeal the [Administrator's] order to the National Transportation Safety Board,

[9] and the National Transportation

Safety Board may, after notice and hearing, amend, modify, or reverse the [Administrator's] order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the [Administrator's] order.

[10] In the conduct of its hearings the National Transportation Safety Board shall not be bound by findings of fact of the [Administrator].

[11] The filing of an appeal with the National Transportation Safety Board shall stay the effectiveness of the [Administrator's] order

[12] unless the [Administrator] advises the National Transportation Safety Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order,

[13] in which event the order shall remain effective and the National Transpor-

tation Safety Board shall finally dispose of the appeal within sixty days after being so advised by the [Administrator].

[14] The person substantially affected by the National Transportation Safety Board's order may obtain judicial review of said order under the provisions of section 1486, and the [Administrator] shall be made a party to such proceedings.

49 U.S.C. § 1486

(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in § 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order.

After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in § 2112 to title 38, United States Code.

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to af-

firm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to

review by the Supreme Court of the United States upon certification or certiorari as porvided in § 1254 of title 28, United States Code.

49 U.S.C. App. § 1487

(a) If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Board or Administrator, as the case may be, their duly authorized agents, or, in the case of a violation of § 1114 of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition or limitation; and such court shall have jurisdiction to enforce obedi-

ence thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and requiring their obedience thereto.

(b) Upon the request of the Board or Administrator, any district attorney of the United States to whom the Board or Administrator may apply is authorized to institute in the proper court and to prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of the provisions of this Act or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit, and for the punishment of all violations thereof, and the costs and expenses of such

prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

49 U.S.C. App. § 1506

Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

* * * * *

SUPREME COURT, U.S.
FILED
OCT 5 1994
OFFICE OF THE CLERK

NO. 94-424

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RICHARD X. KNIPE, GLENN A. VALENTINE
and BERNARD C. FORD,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

LAWRENCE B. SMITH
3938 E. GRANT RD., #191
TUCSON, ARIZONA 85712
602/326-0283

COUNSEL OF RECORD FOR PETITIONER

SEPTEMBER, 1994

HPP

PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.7, Petitioners submit this supplemental brief.

We call the Court's attention to the following significant case which came to Petitioners' attention after their petition for a writ of certiorari was filed: *Mace v. Skinner*, No.92-17014, slip op. 10487 (9th Cir. Sept. 6, 1994) (WESTLAW 1994, WL476730). *Mace* is directly on point to the basic jurisdictional issue before this Court.

In a lengthy and carefully reasoned opinion, the Ninth Circuit held that even though 49 U.S.C. app. § 1486 provides that courts of appeals shall have jurisdiction of Federal Aviation Administration and National Transportation Safety Board orders this did not deprive a United States district court of the subject matter jurisdiction it would otherwise have in a so-called *Bivens* action, *Bivens v. Six*

Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

The same logic used in *Mace* applies to the instant Federal Tort Claims Act ("FTCA") action. "[M]ace's claims . . . are not based on the merits of his individual situation, but constitute a broad challenge to the allegedly unconstitutional FAA practices. [footnote omitted.]" *Mace v. Skinner, supra*, slip op. at 10498; *cf Beins v. United States*, 695 F.2d 592 (D.C.Cir. 1982). The opinion relies heavily on this Court's landmark decision in *McCarthy v. Madigan*, 503 U.S. ___, 117 L.Ed.2d 291.

Mace is one of a series of both *Bivens* and FTCA actions brought by petitioners' counsel for various airmen. It raises many issues identical to those raised by the complaint here. Thus the direct conflict between the decision of the Second Circuit in the instant case and the District of Columbia Circuit's decision in *Beins*,

supra, is made razor sharp by the Ninth Circuit's decision on identical issues concerning the validity of FAA license penalties and enforcement procedures.

Mace also points out that the decision does not prevent in district court a Fed.R.Civ.P.12(b)(6) motion to dismiss for failure to state a claim or arguments concerning absolute or qualified immunity. *Mace v. Skinner, supra*, slip op. at 10499 n. 6.

We note the government has waived its right to file a response, unless requested. The issue here is of great importance to one million airmen. We would hope the Court sees fit to request a response.

Respectfully submitted,

_____

Lawrence B. Smith
Attorney for Petitioners